

# Chief Foe as Chief Defender?

## *Ashcroft Critical of Laws, Decisions He Would Enforce*

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During six years as a U.S. senator, John D. Ashcroft of Missouri frequently voted and spoke against laws, regulations, practices and court decisions that he would be responsible for enforcing if he is confirmed as the next U.S. attorney general.

From gun control to affirmative action, from *Roe v. Wade* to

FBI eavesdropping on e-mail sent to criminal suspects, from drug treatment programs to executive orders protecting gay federal employees, Ashcroft as attorney general would have to uphold positions he has criticized or even denounced.

"I believe it wrongheaded," Ashcroft said of the 1994 ban on assault weapons, for example. "It ... has severely restricted the rights of law-abiding citizens to participate in many activities in-

volving guns." The Supreme Court decision that allowed states to impose restrictions on protesters outside abortion clinics, he said on another occasion, "weakened the First Amendment's speech guarantees."

While many senators confine themselves to several subjects of special interest, Ashcroft's one term in the Senate produced a rich record of forceful positions on crime and drugs, foreign policy, defense policy, education and

■ Ashcroft's speech at Bob Jones U. hit. | Page A7

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BY RAY LUSTIG—THE WASHINGTON POST

Attorney General-designate John D. Ashcroft, left, leaves Capitol after meeting with Senate Democratic leader Thomas A. Daschle.



more. He once proposed tax cuts totaling nearly \$5 trillion over 10 years and the abolition of the departments of Housing and Urban Development, Energy and Commerce.

Most relevant to his nomination are his views on a wide range of legal and constitutional issues, which were clearly expressed in a series of hearings Ashcroft held as chairman of a Senate Judiciary subcommittee. Those views put him at odds with current law, government practice, prevailing court opinions and members of the Republican-appointed majority on the Supreme Court. He described one decision supported by three Republican appointees on the Court as "illegitimate."

These subjects all fall within the purview of the attorney general. They include judicial activism, privacy on the Internet, desecration of the American flag, citizens' right to bear arms, the right to abortion and the setting aside of some federal procurement contracts for racial minorities.

Now, with his confirmation hearing three days away, Ashcroft is working to convince senators that he will impartially enforce the nation's laws as head of the Department of Justice, whose 125,000 employees include the FBI and an army of prosecutors and civil attorneys.

### 'Fair and Firm'

In nominating Ashcroft for attorney general last month, President-elect Bush did not refer to his political record or philosophy. "I wanted someone who would have a commitment to fair and firm and impartial administration of justice," Bush said. "I am confident I've found that person in John Ashcroft."

But Ashcroft's record has convinced liberal groups that his nomination is ripe for attack. People for the American Way, a liberal advocacy group, issued a report last week that concluded: "There is no question that Ashcroft's extreme views place him at the far right of his party and out of the mainstream of American belief."

Ashcroft has proposed seven amendments to the Constitution, including proposals that would overturn *Roe v. Wade* by banning abortion, permit prayer in public

schools, require a "supermajority" in Congress to raise any tax, permit Congress to outlaw desecration of the American flag and impose term limits on members of Congress. He also proposed an amendment to make it easier for state legislatures to avoid Congress and initiate amendments to the Constitution on their own.

Congress did not approve any of the proposals.

By his own account, Ashcroft is a stern critic of the federal courts, "probably more critical than any other individual in the Senate. I have stopped [the nominations of] judges, and I have argued against liberal expansionism, and I will continue to do so," he said in 1998.

He once questioned the procedure by which the Supreme Court interprets the Constitution, saying at a Senate hearing: "We seem to grant less than half a dozen folks in black robes across the street the right to amend [the Constitution] any time they change their minds."

As a senator, Ashcroft took a leading role in trying to overturn

the Supreme Court's 35-year-old *Miranda* decision, which held that police must tell suspects they have a right to a lawyer and the right to remain silent. The court rejected his argument last year and reaffirmed by a 7-2 vote.

Ashcroft has opposed all forms of affirmative action and efforts to extend the protections of anti-discrimination laws to homosexuals. Being gay is "a lifestyle" and "a choice which can be made and unmade," he has said. In the ratings of members of Congress calculated by various interest groups, Ashcroft has consistently ranked among the most conservative members of both houses.

The liberal Americans for Democratic Action gave him a zero rating for 1999; the conservative John Birch Society ranks him higher than Sen. Jesse Helms (R-N.C.). On many controversial issues before the Republican-controlled Senate, Ashcroft voted on the losing side with a bloc of 25 to 35 of the most conservative senators.

Ashcroft was a proud loser on issues he cared about. For example, he boasted that he had succeeded in forcing the Senate to vote on the idea of a constitutional amendment to impose congressional term limits, though the proposal failed.

Ashcroft himself has spoken out against political moderation.

"There are two things you find in the middle of the road," he told an interviewer in 1998, "a moderate and a dead skunk, and I don't want to be either one of those." That same year—as he contemplated a run for the presidency—he said:

"There are voices in the Republican Party today who preach pragmatism, who champion conciliation, who counsel compromise. I stand here today to reject those deceptions. If ever there was a time to unfurl the banner of unabashed conservatism, it is now."

Some conservatives of a libertarian bent tend to oppose federal government action on principle, but Ashcroft has often expressed his conservative positions in support of strong federal action. He has favored requiring states to give drug tests to beneficiaries of federal programs such as food stamps, welfare and job training, and to deny benefits to those who test positive.

He has proposed more extensive federal legislation against illegal drugs, offering a bill that would have authorized police to conduct secret, warrantless searches of suspected producers of methamphetamines. He introduced a bill to extend the federal Corrupt Practices Act to the U.S. Olympic Committee to criminalize bribing of international Olympic officials by U.S. citizens, after scandal erupted over the way Salt Lake City won the 2002 Winter Olympics.

### Public Forums

As chairman of the Senate Judiciary subcommittee on the Constitution, federalism and property rights, Ashcroft called hearings on many of the most controversial constitutional issues of recent years. He invited proponents and critics of his stands on those issues to testify, and generally made a forceful statement of his own beliefs at each hearing:

■ **Affirmative action:** In September 1997, Ashcroft convened a hearing that he called "Unconstitutional Set-Asides" to discuss the impact

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of the Supreme Court's 1995 *Adarand* decision on the Department of Transportation's Disadvantaged Business Enterprise Program.

The ruling set stricter standards for affirmative action programs such as DOT's. The program establishes the goal that 10 percent of contracts signed by states and localities under federal transportation programs should go to "disadvantaged," principally minority-owned, businesses.

At the hearing, Ashcroft said this "program of official discrimination, which has been held unconstitutional by the courts, should stop today. The president should understand that attempting to heal the wounds of the past by racial discrimination today undermines a future of racial reconciliation."

"You cannot presume that as a result of a person's ethnic origin that person is economically disadvantaged," Ashcroft said. "There are economically advantaged and economically disadvantaged individuals of every race."

Nancy E. McFadden, general counsel of DOT, testified at the hearing: "Respectfully, although this hearing is titled 'Unconstitutional Set-Asides,' the fact is that the Disadvantaged Business Enterprise Program is neither unconstitutional nor is it a set-aside."

"Let me state clearly, the Supreme Court has not ruled that the program is unconstitutional," she said. McFadden also noted that the program "was originally signed into law by President Reagan" and was "continued by President Bush."

The program was reauthorized by Congress in 1998 and is still in operation.

■ **Civil rights:** Ashcroft's views surfaced at a hearing of the full Judiciary Committee in November 1997, which considered the nomination of Bill Lann Lee to be assistant attorney general for civil rights.

Although Lee had a "compelling personal history" and was "an out-

standing civil rights advocate," Ashcroft said, he was unacceptable as assistant attorney general because he would pursue the job "with the kind of intensity that belongs to advocacy, but not with the kind of balance that belongs to administration."

Ashcroft said that for businesses that might be the targets of the civil rights division's interest, "It's very costly to argue against what the civil rights division is doing. That's why we need balance here rather than advocacy."

Lee was not confirmed by the Senate. President Clinton named him acting head of the civil rights division, the title he has held for three years.

■ **Judicial activism:** Ashcroft's subcommittee held hearings on judicial activism in June and July 1997. "Judicial activism strikes at the heart of our system of separation of powers," Ashcroft told that hearing.

"When individuals who were not elected and can only be removed with great difficulty are making policy judgments unguided by a congressional or constitutional text, then the people lose their constitutional rights and their freedom to make their own decisions and to govern their own institutions."

In the end, Ashcroft did not support any specific measure to curtail judicial activism. He indicated interest in the idea of limiting federal judges to 20-year terms, but did not formally propose the idea.

Ashcroft made a point of criticizing judges for what he called "activist" decisions that he agreed with, as well as others he disputed. He said, "Justices [John Paul] Stevens, [David H.] Souter and [Anthony M.] Kennedy—Republican appointees one and all—have demonstrated at least as much activism as President Clinton's two nominees," justices Ruth Bader Ginsburg and Steven G. Breyer.

He criticized the justices for ruling that the Constitution's due process clause implied a limit on punitive damages when they rejected a \$2 million judgment against BMW for selling a used car as though it were new.



BY RAY LUSTIG—THE WASHINGTON POST

**Republican Sen. Arlen Specter, left, talks with John D. Ashcroft, who is meeting with key senators in advance of his confirmation hearing next week.**

Ashcroft noted that he has supported legislation to limit punitive damages, but he believed this "illegitimate" Supreme Court decision was the work of "a handful of justices who simply saw their own policy preferences reflected in the due process clause and imposed those preferences on the rest of us."

At another hearing of his subcommittee, Ashcroft condemned the 1989 Supreme Court decision protecting flag-burning as an exercise of free speech, saying it amounted to an amendment of the Constitution by five Supreme Court justices.

"So the question may be . . . how [the Constitution] is to be amended, whether five judges decided to amend it in 1989 or whether the American people have the right to amend it in 1999," Ashcroft said.

■ **Gun control:** Ashcroft has consistently opposed all forms of federal gun control on the grounds that the Second Amendment to the Constitution ensures an unimpeded "right to bear arms" to all Americans.

As attorney general, Ashcroft would oversee enforcement of federal firearms laws, including some he opposes that are under challenge in pending federal court cases. For example, the Clinton administration is defending the assault weapons ban against a lawsuit that is before the Court of Appeals for the D.C. Circuit.

Ashcroft held a hearing in September 1998 on the Second Amendment, which he called "a source of individual rights." The amendment says: "A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed."

Federal courts have held that be-

cause of this introductory reference to a militia, the amendment does not guarantee unrestricted individual rights to keep and bear arms, but rather the rights of the states to maintain an armed militia. "This argument makes no sense to me," Ashcroft said at the hearing.

"A citizenry armed with the right both to possess firearms and to speak freely is less likely to fall victim to a tyrannical central government than a citizenry that is disarmed from criticizing government or defending themselves," he said.

■ **Electronic surveillance:** In March 1998, Ashcroft chaired a subcommittee hearing that he introduced as one designed to "balance the debate by adding the privacy interests of all U.S. citizens to the discussion." In his opening statement, he said: "The FBI has argued that mandatory access to privacy codes would make it easier for law enforcement to do its job. Of course it would—as it would be 'easier' for law enforcement to simply repeal the Fourth Amendment," which bans "unreasonable searches and seizures."

Ashcroft foresaw a negative economic impact if the FBI had broad intercept capabilities on Internet traffic. "Without the protection from privacy," he said, "the Internet is doomed to the status of an international party line or an international broadcast device that will never become a useful means of education, commerce, communications or entertainment."

He also acknowledged that law enforcement officials "have legitimate and important concerns. . . . We must work to provide law enforcement with the necessary amount of access, but we must do so in a manner consistent with our constitutional freedoms."